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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 5th MEETING

Held at the Austria Center Vienna,
on Friday, 5 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Proposal for new article (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.31) for the inclusion of a new article at an appropriate place in the draft Convention, said that it stemmed in part from the discussion on article 1 and was also related to the requirements for the issuance of a document under article 4. Its purpose was to introduce an element of precision into the text of the draft Convention by ensuring that the application of the Convention was clearly indicated. In connection with paragraph (1), it should be stressed that the decision of the carrier or other person having an interest in the goods to provide the operator with a notice indicating that the goods were involved in international carriage was optional. As stated in paragraph (2), written acknowledgement by the operator of receipt of such a notice would be considered prima facie evidence of the applicability of the Convention.
2. Mr. BONELL (Italy) said that, given the definition of international carriage in article 1 (c), he saw no need for express notification of the international character of the carriage as provided for in paragraph (1) of the proposal. As regards paragraph (2), he failed to see why notification that the goods were involved in international carriage should be taken only as prima facie evidence of the applicability of the Convention.
3. Mr. MORAN (Spain), endorsing the comments made by the previous speaker, said that, since paragraph (2) of the proposal seemed to refer more to the scope of application of the draft Convention and was directly related to article 2 (1), consideration of the proposal as a whole should be deferred until the discussion on article 2.
4. Mr. LAVIÑA (Philippines) doubted the need for the proposed paragraph (1) in view of the definition of international carriage given in article 1 (c). Moreover, the international character of the carriage should not be determined by one of the parties unilaterally. He shared the Italian delegation's misgivings about paragraph (2); there again, a unilateral action by one party should not determine the applicability of the Convention.
5. Mr. RUSTAND (Sweden) considered the proposal somewhat superfluous, since it could be assumed that all parties would try to protect their interests by making sure that the operator was aware that the goods were involved in international transport. With regard to paragraph (2), the United Kingdom delegation's aim could be met by amending the wording of article 4 (1) to include the identification of the goods "as being involved in international carriage". He too failed to see why such notification should be only prima facie evidence; any court would deem it conclusive evidence.
6. Mr. ROMAN (Belgium) expressed full support for the United Kingdom proposal as a necessary clarification of the terms of the draft Convention.
7. Mr. WALL (United Kingdom) said that the statements by previous speakers showed clearly that there was a need for greater precision, although there was also perhaps some concern that too much emphasis on precision might be counter-productive. He assured the representative of the Philippines that the

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proposal was not intended to endorse unilateral action. He drew attention to the optional character of paragraph (1). Paragraph (2) provided that, if the operator acknowledged receipt of the notice in question, that would be evidence of the applicability of the terms of the Convention. He was willing to reconsider whether the evidence should be regarded merely as *prima facie*. He would endeavour to draft a new proposal for inclusion in article 4, failing which he would ask that the proposal now under consideration should be discussed afresh as a separate article.

Article 1, proposals for new subparagraphs (A/CONF.152/C.1/L.5) (continued)

8. Mr. LAVIÑA (Philippines) drew attention to certain outstanding questions relating to article 1, particularly the United States proposal concerning the definition of the term "writing" (A/CONF.152/C.1/L.5).

9. The CHAIRMAN said that it had been decided that the Drafting Committee would take account of the United States' concern by ensuring that electronic writing was covered by the formulation used in the Convention with reference to any writing, request or notice.

10. Mr. LAVIÑA (Philippines) said that the United States proposal did not solely concern the inclusion of electronic writing in the definition of the term "writing", but would have implications for many important articles of the draft Convention concerning notices and requests. The Drafting Committee was established primarily to consider questions of style and was not authorized to deal with substantive issues, which should be dealt with in the main Committees.

11. The CHAIRMAN said that he understood the Committee to have taken a decision in the matter.

Article 4 (A/CONF.152/C.1/L.10, L.26, L.35)

12. Mr. OCHIAI (Japan), introducing his delegation's proposal for the insertion of a new paragraph (1 bis) in article 4 (A/CONF.152/C.1/L.26), said that under the provisions of article 4 (1), the operator could be obliged to sign or issue a document even after a suit had been brought against him by the customer. That was undoubtedly not the intention behind the article, and the purpose of the proposal was to subject customers' requests to a time limit.

13. Mr. MORAN (Spain) said that the aims of the Japanese proposal were already met by the substance of article 4 (1); he would therefore prefer to leave the text as it stood.

14. Mr. RUSTAND (Sweden) said that it was clear from the wording of the existing paragraph that either the operator or the customer would raise the question of documentation immediately after the goods had been handed over in the terminal. He did not think that a long period of time would elapse before any of the parties sought to ensure the existence of documentation referring to the handling of the goods. The idea behind the wording "within a reasonable period of time" in the first line of article 4 (1) was that the operator should be allowed sufficient time to issue the document. His delegation was therefore in favour of keeping the existing text of article 4 (1).

15. Mr. OCHIAI (Japan) said that in view of the Swedish representative's comments, his delegation was prepared to withdraw its proposal.

16. The CHAIRMAN invited the Committee to consider the proposal made by Mexico to add a sentence to article 4 (3) (A/CONF.152/C.1/L.35).

17. Mr. ABASCAL (Mexico) said that his proposal was based essentially on comments made by the International Maritime Committee and used the wording contained in the 1990 revision of Incoterms.

18. Mr. RUSTAND (Sweden) said that it was essential not to exclude any modern means of communication. In his view, a message was something that could be immediately transformed into a document or a record of some sort.

19. Mr. ABASCAL (Mexico) said that an electronic message was not necessarily a document. On the other hand, however, the 1990 revision of Incoterms took account of documents and electronic messages used in the international carriage of goods.

20. Mr. BERGSTEN (Executive Secretary) said that the words "which preserves a record of the information contained therein" in article 4 (3) were intended to include any form of communication that would preserve a record. The text was clearly intended to include data contained in a computer. In his view, therefore, the Mexican proposal was not necessary.

21. Furthermore, articles 1 (e) and (f) used language similar to that found in the two uniform Conventions adopted in Ottawa and in the UNCITRAL Model Law on International Commercial Arbitration, which was becoming accepted as the appropriate formulation when moving from the requirement for a paper-based record to one that might be in a magnetic form or a laser disc.

22. Mr. ABASCAL (Mexico) said that in view of the explanation given by the Executive Secretary, his delegation was willing to withdraw its proposal and to leave the matter to the Drafting Committee.

23. Mr. LARSEN (United States of America) said that in light of the statement made by the Executive Secretary, it would not be necessary to consider the matter any further.

24. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) agreed with the United States representative and thought that there was no great need to include in the draft Convention a statement referring to an equivalent electronic data exchange message.

25. Mr. BONELL (Italy) said that if the relevant provision of the 1990 revision of Incoterms stated that a document might be replaced by an equivalent electronic data interchange message, it was then essential for some similar formula to be included in the draft Convention, because otherwise it would be assumed that, for the purposes of the Convention, a document must be in the traditional form.

26. The existing text of article 4 (3) referred to only one of the two possibilities mentioned in paragraph (1), that in subparagraph (b). However, reference should also be made to subparagraph (a). In his opinion, therefore, if paragraph (3) was amended to include a text indicating that the document might be replaced by an equivalent electronic data interchange message, that would cover both situations and introduce a necessary clarification.

27. Mr. TARKO (Austria) said the Drafting Committee should be informed of the fact that there was a fundamental difference between article 1 (e) and (f) and article 4 (3) since under the former all forms were acceptable. In his opinion, a document was something written on a piece of paper, and therefore the operator would have to give the customer a paper of some kind.

28. Mr. LAVIÑA (Philippines) thought that the clarification given by the Executive Secretary had resolved the issue. The Mexican proposal could perhaps be reflected by inserting in article 4 (3), after the words "in any form", the words "including an equivalent electronic data interchange message". The question would be amply covered by articles 1 (e) and (f).

29. Mr. ZHAO Chengbi (China) said that the form of the document was of great importance. For instance, the customer might have to submit a document to the court in order to resolve a conflict. His delegation believed that the draft Convention should fully reflect developments in modern technology. The 1990 revision of Incoterms contained the same idea and referred to an equivalent electronic data interchange message. His delegation therefore supported the Mexican proposal.

30. Mr. MUTZ (Central Office for International Railway Transport), speaking at the invitation of the Chairman, agreed with the Executive Secretary that the wording used in article 4 (3) was broad enough to cover electronic data interchange messages. He noted that the expression "electronic data interchange message" had a specific meaning in the EDIFACT rules adopted by the Economic Commission for Europe. That terminology would be widely used in international trade in the next decade and could be reflected in the draft Convention. Article 4 (3) could be amended to read: "The document may, *inter alia*, be replaced by an equivalent electronic data interchange message".

31. Mr. RUSTAND (Sweden) said he was prepared to accept the Mexican proposal, but only if it was made clear that an electronic data interchange message would be the equivalent of a document in the sense that it would preserve a record of information. The protection provided for the customer under paragraph (1) (b), which ensured that he would have concrete evidence to produce in court in the event of any subsequent dispute, should not be weakened. The Committee needed to be quite sure whether or not an electronic message would preserve a record of information before taking a decision.

32. Mr. RAQ (India) agreed that the only point that now needed clarification was whether an electronic data interchange message would be a valid substitute for a document in the sense that it would preserve a record of information. If it would not, then a question of substance was involved, and the Mexican proposal would need further discussion. If it did preserve such a record, however, then the Mexican proposal could perhaps be transmitted to the Drafting Committee for study in the context of article 1 (e) and (f) and article 4 (3).

33. Mr. BERGSTEN (Executive Secretary) read out the relevant provisions of Incoterms 1990. Under those provisions, it was one of the obligations of the seller to give the buyer notice that the goods had been delivered on board. Where such notice did not take the form of a transport document, the seller was also obliged to assist the buyer in obtaining a transport document, such as a negotiable bill of lading, a non-negotiable seaway bill, an inland waterway document, or a multi-modal transport document. Where the seller and the buyer had agreed to communicate electronically, such a document could be replaced by an equivalent electronic data interchange message.

34. Mr. WALL (United Kingdom) urged that to avoid any possibility of confusion it should be made absolutely clear in article 4 that the document referred to in paragraph (1) (a) should also preserve a record of the information contained therein. In other words, there should be no doubt that there was no difference between the documents referred to in the two subparagraphs, in the sense that they were both records.

35. Mr. LARSEN (United States of America) pointed out that under the Convention for the Unification of certain Rules Relating to International Carriage by Air (the Warsaw Convention), and also under the Montreal Protocol No. 4 thereto, it was already open to the operator to issue the document concerned in electronic form.

36. Mr. BONELL (Italy) said he was glad to note that other delegations shared his concern at the fact that paragraph (1) (a) was excluded from the scope of paragraph (3). That inconsistency should be eliminated, and he therefore proposed that the wording of paragraph (3) should be amended accordingly. The rest of the text of the article should remain unchanged, but with the addition of a formulation along the lines of the Incoterms provision concerning a prior agreement between customer and operator to communicate electronically.

37. The CHAIRMAN pointed out that, while the revised Incoterms 1990 were of the greatest importance in international trade, the International Chamber of Commerce (ICC) was a private association, and a United Nations conference need not necessarily accept unquestioningly all the texts ICC had formulated. It was open to the Committee to approve other proposals if it considered them to have merit.

38. Mr. ROJANAPHRUK (Thailand) said after hearing the Incoterms provisions that had been read out by the Executive Secretary, it was now his view that the formulation of article 4 (3) could remain unchanged, since under article 4 (1) (b) it would be left to the discretion of the operator to issue the signed document in whatever form he considered appropriate. It was also made clear in article 4 (1) (a) that acknowledgement of receipt of the goods would be made only by signing a document presented by the customer at that customer's request. Such a document could take either the traditional form, or the form of an electronic data interchange message.

39. Mr. ROMAN (Belgium) said he had had the impression after hearing the Incoterms text read out that the document concerned need not necessarily be a separate paper, or message, but could simply be a provision in, for example, a bill of lading. Was that in fact the case?

40. Mr. BERGSTEN (Executive Secretary) said the Incoterms requirements he had quoted were for a form of transport document. While the document referred to under article 4 (1) (a) could well be a transport document of some kind, the document referred to in paragraph (1) (b) would of course not be, since it would be issued by the terminal operator.

41. Mr. ROMAN (Belgium) said that he was satisfied with that explanation.

42. The CHAIRMAN said he understood that the United States delegation had agreed that its proposal relating to article 4 (A/CONF.152/C.1/L.10) should be dealt with by the Drafting Committee, which would also take into account the various points raised during discussion on the subject of electronic writing. The Mexican representative having withdrawn his proposal, there were thus no further proposals on article 4 to be considered, apart from the oral proposal made by the Italian representative.

43. Mr. BONELL (Italy) said his proposal was to add to article 4 (3) a new sentence reading as follows: "When the customer and the operator have agreed to communicate electronically, the document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message".
44. Mr. WALL (United Kingdom) said that he had great difficulty in accepting the Italian proposal. He failed to see how, in the absence of any written record, a court could issue a ruling in a case arising in connection with subparagraphs (a) or (b) of article 4 (1).
45. Mr. ZHAO Chengbi (China) said that he accepted the idea of the Italian proposal, which reflected recognition of an important long-term development, but would prefer to see it expressed more briefly, e.g. by the insertion of the words "including electronic data interchange which is agreed between the customer and the operator in the process of business" after the words "issued in any form" in article 4 (3).
46. Mr. ABASCAL (Mexico) said that he supported the Italian proposal, which was not substantially different from the proposal originally made by his delegation and subsequently withdrawn in the light of explanations by the Executive Secretary.
47. Mr. LARSEN (United States of America) also supported the Italian proposal. The industry, whose concerns the Conference should endeavour to meet, had indicated a preference for the approach reflected in the proposal. The decision as to the precise place where the proposed new sentence should appear in the draft could be left to the Drafting Committee.
48. Mr. HERBER (Germany), Mr. OCHIAI (Japan) and Mrs. PIAGGI DE VANOSI (Argentina) also expressed support for the Italian proposal.
49. Mr. RAO (India) said that he entirely agreed with the view expressed by the United Kingdom representative. In the absence of any record the determination of liability would become practically impossible.
50. The Italian proposal was adopted by 14 votes to 12, with 6 abstentions.
51. The CHAIRMAN, noting that a new sentence had now been added to article 4 (3), said that, unless he heard any objection, he would take it that the Committee understood the whole of that paragraph to refer to both subparagraph (a) and subparagraph (b) of paragraph (1).
52. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the agreement between the parties referred to in the second sentence of paragraph (3) just adopted by the Committee had to be concluded in written form or could be an oral one.
53. The CHAIRMAN said that, as he understood the matter, the fact of the sender and receiver of the message being electronically linked was in itself sufficient evidence of agreement.
54. Mr. BONELL (Italy) endorsed that interpretation.
55. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that any form of agreement, including oral agreement, would be acceptable, electronic methods being a particular case. A further point on which elucidation would be welcome was whether electronic data interchange could be used only in the event of agreement

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between the parties, or, in other words, whether the first sentence of paragraph (3) was applicable in the absence of agreement.

56. Mr. BONELL (Italy) said that the first sentence of paragraph (3) remained applicable even without the agreement referred to in the second sentence.

57. The CHAIRMAN confirmed that the two sentences of paragraph (3) were not mutually exclusive, the second sentence being supplementary to the first.

58. Mr. BERGSTEN (Executive Secretary), speaking as Secretary of the Drafting Committee, asked whether the Drafting Committee would be authorized to add such words as "In addition" at the beginning of the second sentence so as to make it clear that a separate concept was being introduced.

59. The CHAIRMAN said that the Drafting Committee was free to make all necessary drafting changes.

60. Mr. ROJANAPHRUK (Thailand), speaking in explanation of vote, said that he had voted against the Italian proposal, not because he had any objection to the idea it contained but because, for reasons stated earlier, he considered it superfluous.

The meeting rose at 12.35 p.m.